CHIA KOK SIONG

v.

CHONG CHEE CHAI & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL WAHAB PATAIL J
[ORIGINATING SUMMONS NO: S4-24-68-2000]
18 MARCH 2003

FAMILY LAW: *Marriage - Validity of - Customary marriage not registered under Law Reform (Marriage and Divorce) Act 1976 - Wife committed suicide - Parents appointed as administrators of estate - Husband claimed he was denied rights under s. 6(b) Distribution Act 1958 - Whether marriage valid - Whether s. 34 of Act 1976 validated marriage - Whether marriage must be solemnised*

The plaintiff claimed to be the husband of one Cheong Foong Meng ('deceased') who had committed suicide and died on 13 June 1999. The parents of the deceased were appointed as the administrators of her estate. The plaintiff alleged that at the hearing of the application to be appointed as administrators of the estate, the parents of the deceased concealed the fact that he was the husband and so denied him of his rights under s. 6(b) of the Distribution Act 1958. According to the plaintiff, he and the deceased had performed the marriage according to Chinese customary rites on 14 June 1998. Although they had signed the form to register their marriage, they had failed to do so under the Law Reform (Marriage and Divorce) Act 1976 ('LRA'). Further, the plaintiff alleged that he paid for all the funeral expenses.

The issue was whether the marriage was valid in view of s. 34 LRA. Section 34 provides that the registration of a marriage or a failure thereof does not alter the inherent validity or otherwise of a marriage.

Held:

[1] A marriage is not a marriage unless it is a valid marriage. Otherwise it remains a purported marriage, without the legal effect of a valid marriage. The LRA could not have intended by s. 34 LRA to allow every purported marriage to be held valid regardless of whether it is a marriage recognised as valid by the respective religious ceremony, custom or usage relied upon. (p 420 b)

[2] The purported marriage in this case falls under the purview of the LRA. Section 24 LRA is the primary provision with regard to marriages through religious ceremony, custom or usage. Sections 22(3) and 24(2) make it plain that a valid marriage must be solemnised by the person appointed to act as assistant registrar of marriages. This is distinct from the concept of registration required under s. 27 LRA. Notwithstanding the use of the mandatory language, s. 27 is directory because of s. 34. However, nothing in s. 34 diminishes the requirement of solemnisation required under s. 22(3) and s. 24(2) LRA. (pp 420 c-d, 422 d & 423 a)

[3] The purpose of having the assistant registrar to solemnise the customary marriage by his attendance is not only to dignify or make formal the ceremony, but also to be a trustworthy witness to the marriage. He may be the only independent party in attendance who has no reason to hesitate to prevent the marriage if a just impediment to the marriage is brought to his attention. The attendance of the assistant registrar intended by the LRA is not only to protect existing wives and children but also the bride too blinded by promises of marital bliss to be concerned to ask any questions. Marriages through custom or usage if unsupervised by an assistant registrar of marriages, are capable of abuse. Therefore, it is clear that the LRA does not intend the marriages that are not solemnised by the assistant registrar of marriages to be recognised as a valid marriage. It would liberalise the very abuse that the LRA seeks to control. (p 423 d-f)

[4] The pleadings before the court assert only that a Chinese customary ceremony, photographs and dinner were carried out with no reference to solemnisation under the LRA. On this ground, the application must be dismissed. (p 424 a)

[5] Even though the plaintiff paid for the funeral expenses and s. 34 LRA provides that failure to register a customary marriage does not make a marriage otherwise legal to be illegal, the fact of failure to register betrayed a possible lack of intention to accept the ceremony as a marriage. Further, the plaintiff's refusal to describe the deceased as his wife and instead describing her as a sister contradicted his assertion that they were legally married. This indeed is the very circumstance why solemnisation by an assistant registrar is required. (p 424 b-c)

[Application dismissed.]

Case(s) referred to:
Chong Sin Yen v. Janaki Chellamuthu [1997] 2 CLJ 699 HC ***(refd)***
Leong Wee Shing v. Chai Siew Yin [2000] 1 CLJ 439 HC ***(refd)***
Re Estate of Chong Swee Lin; Kam Soh Keh v. Chan Kok Leong & Ors [1996] 1 BLJ 485 HC ***(refd)***
W and T [1998] FamCA 49 ***(refd)***
Yeoh v. Chew [2001] 4 CLJ 631 HC ***(refd)***

Legislation referred to:
Distribution Act 1958, s. 6(b)
Law Reform (Marriage and Divorce) Act 1976, ss. 22(3), 24(2), 25, 27, 34

Other source(s) referred to:
New Shorter Oxford Dictionary, 1993 edn, p 2939

For the plaintiff - M/s Saibullah MV Nathan & Co
For the defendants - M/s WK Yap, Loo & Co

Reported by Usha Thiagarajah

JUDGMENT

Abdul Wahab Patail J:
The plaintiff is the husband of Cheong Foong Meng, deceased. The administrators of her estate are her father and mother. The case for the plaintiff is that he and the deceased had performed the marriage according to Chinese customary rites on 14 June 1998. But although they had signed the form to register the marriage, they had failed to register the marriage under the Law Reform Act (the Law Reform Act). They had lived together at C18, Pangsapuri Anggerik, Jalan Puchong Jaya, Bandar Puchong Jaya. The deceased committed suicide and died on 13 June 1999. According to the plaintiff he had paid for all of the funeral expenses. He alleged that the administrators had concealed the fact he is the husband at the hearing of their application to be appointed as administrators, and have since denied him his rights under s. 6(b) of the Distribution Act 1958.

It is agreed by the parties that the issue before the court is whether under the Law Reform Act an unregistered Chinese customary marriage is a valid marriage. Having heard submissions thereon, the application was rejected. The grounds of decision are as follows.

The requirement of registration is contained in s. 27 of the Law Reform Act:

> The marriage of every person, ordinarily resident in Malaysia and of every person resident abroad who is a citizen of or domiciled in Malaysia after the appointed date shall be registered pursuant to this Act.

The appointed date is 1 March 1982. The legal effect of registration or failure of it is provided for in s. 34 of the Law Reform Act as follows:

> Nothing in this Act or the rules made hereunder shall be construed to render valid or invalid any marriage which otherwise is invalid or valid merely by reason of its having been or not having been registered.

In its plain and ordinary meaning the section means that the act of registration does not confer validity upon a marriage otherwise invalid, and neither does failure to register render a marriage otherwise invalid to be valid. To that extent the act of registration is mere formality.

RK Nathan J set out his view of the effect of s. 34 Law Reform Act in *Leong Wee Shing v. Chai Siew Yin* [2000] 1 CLJ 439 as follows:

> I am of the view that pursuant to section 34 of the Act, the Plaintiff does not even have to show that there was a marriage valid according to Chinese customary rites so long as there was a valid marriage. It is pertinent to note that section 34 refers to the existence of 'any marriage' and it is also relevant to note that the word 'marriage' is not defined in the definition section. It is therefore necessary to look at its every day meaning attributed to 'marriage' as understood by the man in the street. Chambers Dictionary 20th Edition defines 'marriage' as 'the ceremony, act or contract by which a man and a woman become husband and wife'. It is my judgment therefore that the very act of printing and sending a wedding invitation inviting friends and relatives to witness the wedding between the plaintiff and the deceased and also the 'tea drinking ceremony' and the further request to attend the wedding dinner that same night (all stated in the wedding invitation card) clearly reflect the act of marriage having taken place on 19.11.1995. It is my judgment therefore that the requirement of section 34, that marriage had indeed taken place, has been satisfied.

That case concerned a Chinese wedding. The references to the sending of invitations to attend and witness the wedding and the tea-drinking ceremony, and to the wedding dinner that same evening, and the absence of any evidence to show it was not in accordance with Chinese customary marriage

as to render it invalid, shows that it was accepted by the learned judge that there was in fact a valid Chinese customary marriage. Indeed the learned judge had concluded earlier:

> In the case before me there was no issue raised by the defendant in respect of the "tea-drinking ceremony". Therefore I must take it that such a ceremony had indeed taken place. I am satisfied that considering the fact that the deceased and the plaintiff had taken wedding photographs, had printed and sent out wedding invitation cards, had invited guests for the wedding dinner wherein the defendant herself was present, there are sufficient grounds to find that there was a valid marriage subsisting between the plaintiff and the deceased. Whilst I agree that section 4 of the Act refers to customary marriages solemnized prior to 1.3.82, section 34 is the proper section to validate this marriage.

The wider statement that no valid marriage need to be proven is therefore unnecessary to the decision, and cannot constitute the *ratio decidendi* of that case. It is at best *obiter dicta*. Having found that there was in fact a valid Chinese customary marriage, the result followed established authority that failure to register is of no consequence so long as there has been a valid customary marriage. In *Yeoh v. Chew* [2001] 4 CLJ 631 there was no marriage. In *Chong Sin Yen v. Janaki a/p Chellamuthu (suing as widow of Muniappa Pillai a/l Maritha Muthoo, Deceased, on behalf of herself and the dependants of the Deceased)* [1997] 2 CLJ 699, Mohd Ghazali J (as his Lordship then was) held non-registration would not invalidate an otherwise valid marriage:

> ... On the face of it, it would seem that customary marriage underwent by the respondent and the deceased, as far as the 1976 Act is concerned, would be void – they had not contracted a customary marriage after the date of coming into operation of the 1976 Act and there is no evidence to show that it was solemnized pursuant to the provisions of the 1976 Act, neither has the respondent furnished a copy of the certificate of marriage issued pursuant to the Act. Since the respondent's marriage to the deceased would seem to be void pursuant to the provisions of the 1976 Act, does that preclude her from bringing an action under ss. 7 and 8 of the CLA?
>
> ... s. 34 provides ... The above provisions would denote that a customary marriage would be a valid marriage if it is solemnized by a priest of any temple who is duly appointed by the Minister pursuant to the provisions of the 1976 Act but its non-registration would not necessarily invalidate such a marriage.

In *Re Estate of Chong Swee Lin; Kam Soh Keh v. Chan Kok Leong & Ors* [1996] 1 BLJ 485, the issue was whether there was a valid Chinese customary marriage. Expert evidence was brought to prove that there was in fact a valid Chinese customary marriage.

It is clear therefore that under s. 34 Law Reform Act, registration or its failure does not alter the inherent validity or otherwise of a marriage. A marriage in my view is not a marriage unless it is a valid marriage. Otherwise it remains a purported marriage, without the legal effect of a valid marriage. The Law Reform Act cannot have intended by s. 34 to allow every purported marriage to be held valid regardless of whether it is a marriage recognized as valid by the respective religious ceremony, custom or usage relied upon.

The purported marriage in this case was undertaken on 14 June 1998. It unquestionably falls under the purview of the Law Reform Act. What then is a valid Chinese customary marriage on that date under the Law Reform Act?

Section 24 of the Law Reform Act is the primary provision with regard to marriages through religious ceremony, custom or usage. It specifically provides as follows:

24. Solemnization of a marriage through religious ceremony, custom or usage.

(1) Where any clergyman or minister or priest of any church or temple is appointed by the Minister to act as Assistant Registrar of Marriages for any marriage district, such clergyman or minister or priest may after delivery to him of a statutory declaration under sub-section (3) of section 22 solemnize any marriage, if the parties to the marriage or either of them profess the religion to which the church or temple belong, in accordance with the rites and ceremonies of that religion.

(2) *Where any person is appointed by the Minister to act as Assistant Registrar of Marriages for any marriage district such person may after delivery to him a statutory declaration under subsection (3) of section 22 solemnize any marriage in accordance with the custom or usage which the parties to the marriage or either of them practise.*

(3) An Assistant Registrar solemnizing a marriage under this section shall in some part of the ceremony remind the parties that either of them shall be incapable during the continuance of the marriage of contracting a valid marriage with any other person and if either of them shall marry during the continuance of the marriage he or she shall commit an offence.

(4) In this section,

"priest of a temple" includes any member of a committee of management or governing body of that temple and any committee member of any religious association;

"priest of a church" includes any officer or elder of the church.

Section 22(3) of the Law Reform Act provides:

(3) A valid marriage may be solemnized under subsection (1) (c) by an Assistant Registrar if he is satisfied by statutory declaration that:

(a) either:

(i) each of the parties is twenty-one years of age or over, or, if not, is a widower or widow, as the case may be, or

(ii) if either party is a minor who has not been previously married and the female party not under the age of sixteen years that the consent of the appropriate person mentioned in section 12 has been given in writing, or has been dispensed with, or has been given by a court in accordance with section 12;

(b) there is no lawful impediment to the marriage;

(c) neither of the parties to the intended marriage is married under any law, religion, custom or usage to any person other than the person with whom such marriage is proposed to be contracted; and

(d) in so far as the intended marriage is a Christian marriage and is to be solemnized in accordance with the rites, ceremonies or usages of a Christian religious denomination, the provisions of the canons of such religious denomination relating to the publication of banns or the giving notice of the intended marriage have been complied with or lawfully dispensed with in accordance with such canons.

Section 24(2) clearly provides that after a statutory declaration under s. 22(3) has been delivered to him, a person appointed by the Minister to act Assistant Registrar of Marriages may solemnize the marriage in accordance with the custom or usage which the parties to the marriage or either of them practice. Thus he may solemnize a customary marriage only after the delivery to him of a statutory declaration under s. 22(3). Since s. 24(3) of the Law Reform Act provides an assistant registrar solemnizing a marriage under this section shall in some part of the ceremony remind the parties that either of them shall be incapable during the continuance of the marriage of contracting a valid marriage with any other person and if either of them shall marry during the continuance of the marriage he or she shall commit an offence, it is crystal clear that the Assistant Registrar of Marriages must be present in the customary marriage under the Law Reform Act to perform his function.

Both provisions refer to the concept of "solemnization" of marriages. The concept first appeared in the 14th Century. These two provisions make it plain that a valid marriage must be solemnized by the person appointed to act as assistant registrar of marriages. This is distinct from the concept of registration which is required under s. 27 of the Law Reform Act:

> **27. Registration.**
>
> The marriage of every person ordinarily resident in Malaysia and of every person resident abroad who is a citizen of or domiciled in Malaysia after the appointed date shall be registered pursuant to this Act.

Section 25 of the Law Reform Act provides that registration is made after solemnization of the marriage:

> **25. Entry in marriage register.**
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> (1) Immediately after the solemnization under section 23 or 24 is performed the Registrar shall enter the prescribed particulars in the marriage register.
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> (2) Such entry shall be attested by the parties to the marriage and by two witnesses other than the Registrar present at the solemnization of the marriage.
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> (3) Such entry shall then be signed by the Registrar solemnizing the marriage.

Notwithstanding the use of the mandatory language, s. 27 is directory because of s. 34. However nothing in s. 34 diminishes the requirement of solemnization required under s. 22(3) and s. 24(2) of the Law Reform Act. Neither "solemnized", "solemnization" nor "solemnizing" is defined in the Law Reform Act. The *New Shorter Oxford Dictionary*, 1993 edn, defines it at p. 2939 as follows:

> A. v. 1. v.t. Dignify or honour by a ceremony or ceremonies; celebrate or commemorate (an occasion etc.) by special observances or with special formality.
>
> LME 2. v.t. Celebrate (a marriage) with proper ceremonies and in due for; duly perform the ceremony of (marriage).

The judgment of Justice Fogarty in the Full Court of the family Court of Australia at Sydney in *W and T* [1998] FamCA 49 is illuminating of this somewhat cryptic term. The purpose of having the assistant registrar to solemnize the customary marriage by his attendance is not only to dignify or make formal the ceremony, but also to be a trustworthy witness to the marriage and perhaps more importantly, he may be the only independent party in attendance who has no reason to hesitate to prevent the marriage if a just impediment to the marriage is brought to his attention. The attendance of the Assistant Registrar of Marriages is, in my view, intended by the Law Reform Act to protect not only existing wives and children but also the star-struck bride who might have been too blinded by promises of marital bliss to be concerned to ask any questions. The purpose of the requirement of solemnization by the Assistant Registrar of Marriages in marriages not conducted under the formal process of a civil marriage, such as marriages through custom or usage, is self-evident. Such marriages, if unsupervised by an Assistant Registrar of Marriages to solemnize it, are obviously capable of abuse. Indeed it is so obviously so that it is very clear that the Law Reform Act does not intend the marriages that are not solemnized by the Assistant Registrar of Marriages to be recognized as a valid marriage. It would liberalize the very abuse that the Law Reform Act seeks to control.

The pleadings before the court in the affidavits assert only that a Chinese customary ceremony of invitation, tea-ceremony, photographs and dinner was carried out, with no reference to solemnization under the Law Reform Act. On this ground the application must fall and be dismissed.

Considering the rest of the evidence before me, I concluded that even though he paid for the funeral expenses, and s. 34 provides that failure to register a customary marriage does not make a marriage otherwise legal to be illegal, the fact of failure to register betrays possible lack of intention to accept the ceremony as a marriage. Certainly refusal to describe the deceased as his wife and instead of which describing the deceased as a sister contradicts his current assertion that they were legally married. This indeed is the very circumstances that solemnization of a customary marriage by an Assistant Registrar of Marriages under ss. 23 and 24 of the Law Reform Act.

The application was therefore dismissed with costs.